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No. 125

In the Supreme Court of the United States

OCTOBER TERM, 1960

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, AND SUPERIOR DERRICK CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court below (Pet. 1a–11a) is reported at 273 F. 2d 891. The Board's decisions and orders are reported at 122 NLRB 52 (R. 76–94) and at 127 NLRB No. 11 (Pet. 14a–17a).[1]

[1] "R" references are to portions of the Transcript of Record printed pursuant to the rules of the court below as Volume I. "J.A." references are to portions of the testimony and exhibits printed as a joint appendix to the briefs of the respective parties below. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The judgment of the court below (Appendix, p. 14, *infra*) was entered on January 21, 1960. The decree of the court was entered on March 9, 1960, and a supplemental decree was entered on May 23, 1960 (Pet. 12a–13a, 19a–20a). The petition for a writ of certiorari was filed on June 3, 1960.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The principal question is whether substantial evidence supports the Board's conclusion that the Union's picketing at wharves, at which both employees of the primary employer and those of neutral employers were working, was aimed at the latter, in violation of Section 8(b)(4) (A) and (B) of the National Labor Relations Act.

Subsidiary questions involve (1) whether the petition for certiorari was timely with respect to the judgment entered on January 21, 1960; (2) whether the court below encroached on the primary jurisdiction of the Board in ordering it to enter an injunction rather than remanding for further findings of fact; and (3) whether the petitioner was prejudiced by the refusal of the court below to permit it to intervene.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at p. 3 of the petition.

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[2] For reason given below, p. 8, *infra*, the petition appears to be untimely with respect to one part of the case.

STATEMENT

A. The Board's findings

On July 9, 1957, petitioner Union, claiming that it represented a majority of Superior's employees, requested to be recognized as bargaining representative (R. 45, 79; J.A. 8–9, 121–122). When Superior did not immediately grant recognition, the Company's employees went on strike and began picketing at the Charbonnet Street Wharf in New Orleans (R. 79; J.A. 13–14, 109). Two floating derricks owned by the Company were then being used at that location to load a cargo of steel aboard a ship (R. 79; J.A. 13, 109). Because of the picketing, members of Locals 1418 and 1419 of the International Longshoremen's Association, employed to assist in the loading, refused to work on the ship and the Company was unable to complete the job (R. 80; J.A. 13, 83–86, 91–93).[3] The picket signs used at the Charbonnet Street Wharf and during all subsequent picketing incidents referred to below, bore the following legend (R. 79; J.A. 19–22, 153):

NO DISPUTE WITH ANY
OTHER EMPLOYER
EMPLOYEES OF
SUPERIOR DERRICK CORP.
ON STRIKE
FOR BETTER WAGES
HOURS & CONDITIONS
SEAFARERS INT. UNION
AFL–CIO

[3] Since these longshoremen were employed by a stevedoring firm that was affiliated with Superior, the foregoing incident

On September 22, Superior was conducting derrick operations at Gretna Wharf, property of the Southern Pacific Railroad (R. 48; J.A. 17–18). The job consisted of unloading, by boom, a cargo of bauxite from a vessel to railroad gondolas on the wharf (R. 48; J.A. 18–19). Union pickets appeared on the wharf, and shortly thereafter they were approached by members of a Southern Pacific train crew who asked them what the picketing was about (R. 48; J.A. 135–136, 142–143, 154–155). The Union representatives told the railroad employees that the picketing was legal and "informed them to read our signs and further told them that the signs were self-explanatory" (J.A. 142–143, 154–155). The train crewmen thereafter refused to move the railroad cars, and Superior was able to complete its work at the Gretna Wharf only after railroad white collar workers moved the cars (R. 49–50; J.A. 25–27, 32, 34, 37–39).

On October 9, one of Superior's derricks was engaged at the Dumaine Street Wharf in New Orleans in transferring steel plates from a barge and loading them aboard a ship (R. 80; J.A. 45–46). Some 75 to 100 longshoremen represented by Locals 1418 and 1419 of the International Longshoremen's Association were employed by Texla Stevedoring, Inc., to perform the longshore work on the ship (R. 80; J.A. 46, 71–72). The work of the employees of Superior and Texla proceeded without interruption until the Union's pickets appeared and stationed themselves

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was not alleged to have been a violation of Section 8(b)(4) of the Act (R. 80; J.A. 2, 52–53). It does, however, shed light on other picketing incidents hereafter described.

at the gangway leading to the ship and to the derrick (R. 80; J.A. 47, 124–125). The stevedores refused to cross the picket line, and asked picket leader Thomas Gould what the picketing was about (R. 80–81; J.A. 130–131). Gould at first refused to answer their questions and remained silent (R. 80–81; J.A. 130–131). He was then approached by Paul Guillory, an agent for Local 1419, who told Gould that his men were working under contract for Texla and would have to continue working (R. 51; J.A. 89–94). Gould replied that he was not telling Guillory either way—to work or not to work—and that he had nothing to do with the Longshoremen's Union. Gould referred to the picket sign saying, "There is the picket sign. It is a legitimate SIU picketing sign" (R. 51–52; J.A. 125, 126). The longshoremen did not return to work for an hour and a half, when they were finally instructed to do so by Guillory (R. 52; J.A. 50, 98).

B. The Board's conclusions and order

The Board found no violation of Section 8(b)(4) with respect to the Gretna Wharf picketing, on the ground that the only employees at that location allegedly induced by the Union to cease work were railroad employees, and railroad employees were not "employees" within the meaning of that Section (R. 77–78).[4] However, with respect to the picketing at the Dumaine Street Wharf, the Board concluded that the Union violated Section 8(b)(4) (A) and (B) of

[4] The 1959 amendments to the Act have since clearly placed railroad workers within the class of persons who may not be induced to engage in the activity prohibited by Section 8(b)(4). 73 Stat. 519, 542, 29 U.S.C., Supp. I, 158(b)(4).

the Act. Applying the evidentiary criteria formulated in *Moore Dry Dock Co.*, 92 NLRB 547, 549, for ascertaining whether picketing at a common situs has a primary or an illegal secondary object, the Board found that the Union had failed to observe the requirement that the picketing disclose clearly that the dispute is with the primary employer. In the Board's view, Union representative Gould could have anticipated, from the experience at Charbonnet, that the longshoremen would be likely to regard the picketing, irrespective of the legend on the signs, as aimed at them. In these circumstances, the Union's failure to answer clearly and without evasion inquiries of the longshoremen concerning the purpose of the picketing evidenced an intention to extend the picketing beyond Superior to neutral, secondary employers (R. 81–82).

The Board's order dismissed the complaint as to the Gretna picketing. As to the Dumaine picketing, it required the Union to cease and desist from inducing or encouraging the employees of Texla Stevedoring, Inc., or any other employer, to engage in a concerted refusal to perform services with an object of forcing a cessation of business relations with Superior, or forcing Superior to recognize or bargain with the Union unless it has been certified under Section 9 of the Act. Finally, the order required the Union to post appropriate notices (R. 84–86, 93–94).

C. The Court of Appeals proceedings

Superior, the charging party before the Board, petitioned the court below to review that part of the Board's order dismissing the complaint as to the

Gretna or railroad picketing. The Board also petitioned the court to enforce the portion of its order directed against the Union. The two cases were consolidated for purposes of argument, and the Union, although denied leave to intervene in the review case, was permitted to submit a brief therein as *amicus curiae* and to argue orally (Pet. 26).

The court upheld, as adequately supported by the record, the Board's conclusion that the Union's picketing at the Dumaine Street Wharf was for objects prohibited by Section 8(b)(4) (A) and (B) of the Act. The court agreed that, in the light of the earlier Charbonnet Street incident where the same longshore locals had observed the Union's picket line, picket leader Gould's failure to answer clearly and without evasion the inquiries of the longshoremen concerning the purpose of the picketing justified the inference that the Union had an illegal secondary object (Pet. 6a–8a).

With respect to the Gretna Wharf picketing, the court, adhering to the view expressed in two earlier decisions,[5] found, contrary to the Board, that railroad employees were covered by Section 8(b)(4) of the Act. Noting that it was clear from the record that the Union's object at Gretna was the same as that at Dumaine, the court went on to find, without first submitting this issue to the Board, that the Gretna picketing was also violative of Section 8(b)(4) (A) and (B) (Pet. 4a–5a).

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[5] *International Rice Milling Co.* v. *National Labor Relations Board*, 183 F. 2d 21 (C.A. 5), reversed in part on another ground, 341 U.S. 665; *W. T. Smith Lumber Co.* v. *National Labor Relations Board*, 246 F. 2d 129 (C.A. 5).

The court therefore enforced the remedial portions of the Board's order, and reversed the dismissal portion, remanding that part of the case to the Board with directions to enter an appropriate supplemental order (Pet. 11a). A judgment to this effect was entered on January 21, 1960 (p. 14, *infra*), the same day as the court's opinion.

The Board thereafter presented to the court a decree implementing its judgment and decision, which was entered on March 9, 1960 (Pet. 12a–13a). Furthermore, it accepted the remand on the Gretna picketing and, on April 13, 1960, entered an amended order banning such picketing (Pet. 14a–17a). This order was enforced by a supplemental decree entered by the court on May 23, 1960 (Pet. 19a–20a).

ARGUMENT

1. The judgment of the Court of Appeals enforcing the Board's order with respect to the picketing at the Dumaine Wharf was entered on January 21, 1960. The petition for certiorari, however, was not filed until June 3, 1960, more than 90 days after the entry of the judgment. Although a decree was entered after the judgment, it did not change any matter of substance or resolve any genuine ambiguity in the judgment, insofar as the Dumaine Wharf picketing was concerned. Nor did the remand to the Board for a supplemental order covering the Gretna Wharf picketing affect the finality of the judgment respecting the Dumaine Wharf picketing. Accordingly, it would appear that, under *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, the peti-

tion, to the extent that it seeks review of the Board order remedying the Dumaine Wharf picketing, is untimely.

2. Insofar as the substantive question which petitioner seeks to raise is also presented by the Gretna Wharf picketing, it does not warrant review by this Court. The fundamental issue is whether the Union's picketing at a site where both employees of the primary employer and those of a neutral secondary employer were at work was confined, as nearly as practicable, to the primary employer, or whether it was aimed at the secondary employer and his employees. If the former, the picketing is legitimate primary activity; if the latter, it is for an object proscribed by Section 8(b)(4)(A).[6] The court below, after examining the circumstances surrounding the Union's picketing of Superior's operations on the New Orleans waterfront, concluded that there was sufficient basis to warrant the conclusion that the Union's object was a secondary one (Pet. 5a–6a). Stripped of its trappings, petitioner's position is that the record does not support such conclusion. The resolution of this factual question adversely to petitioner does not present an issue appropriate for certiorari.

In any event, the record adequately supports the conclusion reached. As noted above, the Union was well aware, from its experience at the Charbonnet

[6] The 1959 amendments to the Act do not have any bearing on this aspect of the case.

Wharf, that other unionized employees would be likely to regard the picketing as a strike signal to them, notwithstanding the fact that the signs indicated that the dispute was only with Superior. Accordingly, when the picketing was extended to other wharves, it was reasonable to expect that the Union, if it were sincere in its ostensible desire to confine the picketing to Superior, would give a forthright answer to secondary employees concerning the purpose of the picketing, should inquiry be made. When, instead, Union agents gave evasive replies, the inference was warranted that the Union was in fact aiming its picketing at the secondary employer and his employees.

The conclusion that the legend on the picket sign may be negated by equivocal action accompanying the picketing, far from constituting "adjudicatory flyspecking" (Pet. 23), accords with settled authority, as the court below noted (Pet. 7a–8a). See *National Labor Relations Board* v. *General Drivers, Local 968*, 225 F. 2d 205, 207–208 (C.A. 5); *Truck Drivers Local 728* v. *National Labor Relations Board*, 249 F. 2d 512, 514 (C.A.D.C.), certiorari denied, 355 U.S. 958; *General Truck Drivers Local 270* v. *National Labor Relations Board*, 252 F. 2d 619 (C.A.D.C.), certiorari denied, 356 U.S. 931, enforcing 117 NLRB 885, 886; *National Labor Relations Board* v. *Laundry Drivers Local No. 928*, 262 F. 2d 617, 620 (C.A. 9). Nor is a conflict of decisions justifying review by this Court presented by petitioner's effort to show (Pet. 18–22) that there is language in the opinion of the court below which appears to indicate an approach different

from that of the Court of Appeals for the District of Columbia Circuit in *Seafarers International Union* v. *National Labor Relations Board* (*Salt Dome*), 265 F. 2d 585. The facts of the *Salt Dome* case are clearly distinguishable from the situation here, there being no conduct by the union which would in any way negate the primary object stated on the picket signs. Indeed, in situations more analogous to the instant case—i.e., *Truck Drivers, Local 728, supra,* and *General Truck Drivers, Local 270, supra*—the District of Columbia Circuit has reached the same conclusion as the court here. See also, *Local 761, International Union of Electrical Workers* v. *National Labor Relations Board,* 45 LRRM 3190, 3192–3193 (C.A.D.C.), April 18, 1960, explaining the limited scope of the earlier *Salt Dome* decision.

3. Nor is an issue warranting certiorari presented by petitioner's contention (Pet. 23–26) that the court should not have made a finding on the objective of the Gretna picketing but should have referred the matter to the Board for initial decision. Since the court had all of the facts before it, and the situation was essentially similar to the Dumaine picketing, where the court had sustained the Board's finding of a violation, the court considered it proper to decide the question itself without first obtaining the Board's views thereon. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 331 U.S. 416, 428. In any event, the Board acquiesced in the court's decision by accepting the remand and proceeding to issue a supplemental decision and order.

Similarly, no issue warranting review is presented by petitioner's contention (Pet. 26) that it was erroneously deprived of the right to intervene in the proceeding instituted by Superior against the Board to review its dismissal of the portion of the complaint pertaining to the railroad picketing. It does not appear that petitioner was prejudiced by the court's denial of its motion to intervene. It was granted full opportunity to present its views in the review proceeding, through an *amicus curiae* brief and on oral argument. Moreover, after the reversal of the Board on the railroad picketing, the Board issued a supplemental decision and order, which was subsequently enforced in a proceeding brought against the Union (Pet. 19a–20a). That proceeding gives petitioner standing to petition for certiorari with respect to the railroad picketing just as if it had been a party to the proceeding first instituted by Superior.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1960.

APPENDIX

Judgment

Extract from the Minutes of January 21, 1960

No. 17512

SUPERIOR DERRICK CORPORATION

v.

NATIONAL LABOR RELATIONS BOARD

No. 17619

NATIONAL LABOR RELATIONS BOARD

v.

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL–CIO

These causes came on to be heard on the petition of Superior Derrick Corporation for review and to set aside an order of the National Labor Relations Board made on November 12, 1958 in the proceeding known upon the records of the Board as Case No. 15–CC–71; and on petition of the National Labor Relations Board for enforcement of said Order, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the order of the Board for the injunction in this cause be, and the same is hereby, enforced; and that the Board's order denying the injunction as to the railroad picketing be, and it is hereby, reversed; and the matter is remanded to the Board for further consistent proceedings and with directions to enter an appropriate injunction.

U. S. GOVERNMENT PRINTING OFFICE, 1960